No. 09-1325

Supreme Court, U.S.
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In The
Supreme Court of the United States

DAVID H. MILLS, DIRECTOR OF THE INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS,

Petitioner,

v.

MIDWEST TITLE LOANS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that the dormant Commerce Clause prohibits Indiana's extraterritorial enforcement of a unique "Territorial Application Provision" that sought to extend the reach of Indiana's version of the Uniform Consumer Credit Code to loan transactions that the parties stipulated were entered into in-person "wholly outside of the State's borders." *Healy v. The Beer Institute*, 491 U.S. 324, 336 (1989).

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that respondent Midwest Title Loans, Inc. has no parent corporation or publicly-held company owning 10% or more of its stock.

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INTRODUCTION

In this case, the District Court (Judge Sarah Evans Barker) and a unanimous Seventh Circuit Court of Appeals panel (per Judge Richard Posner) rendered comprehensive, carefully reasoned opinions that correctly concluded that the dormant Commerce Clause prohibits Indiana's unique effort to engage in extraterritorial regulation of loan transactions entered into in-person in Illinois. *Midwest Title Loans v. Ripley*, 616 F.Supp.2d 897 (S.D. Ind. 2009), *aff'd sub nom. Midwest Title Loans v. Mills*, 593 F.3d 660 (7th Cir. 2010). In enjoining the enforcement of Indiana's "Territorial Application Provision," which impermissibly sought to extend the reach of Indiana's Uniform Consumer Credit Code to loan transactions that the parties stipulated took place entirely in Illinois, the lower courts relied upon and were entirely faithful to this Court's well-settled Commerce Clause jurisprudence, which establish that the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. The Beer Institute*, 491 U.S. 324, 336 (1989); *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion).

Each of the lower courts expressly acknowledged the concern of Indiana and its amici about protecting the economic well-being of Indiana consumers, but properly recognized that "however well intentioned" the Territorial Application Provision may be, it cannot pass muster under the Commerce Clause because it

directly regulates commerce occurring wholly outside the State's boundaries. Pet. App. 12a. *See Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.").

Neither the Petitioner nor his amici has identified any conflict whatsoever between the Seventh Circuit's decision and the decisions of any other court of appeals or state supreme court. As correctly recognized by both the District Court and the Seventh Circuit, this case is readily distinguishable from the various cases cited by Petitioner and his amici, as none of those cases involved transactions entered into in-person wholly outside the boundaries of the regulating state. In fact, Petitioner and his amici have not identified *any* case in which an appellate court has upheld extraterritorial regulation of a loan or purchase entered into in-person outside the regulating state. Not only was Judge Posner's cogent opinion amply supported by this Court's well-settled precedents under the dormant Commerce Clause, it also relied upon a number of cases from other circuits which have likewise held that if a state statute directly regulates interstate commerce in other states, it violates the Commerce Clause *per se*. Pet. App. 10a-11a.

The opinion below did not plow any new ground and does not conflict with applicable precedents from this Court or any other circuit. Moreover, the

Territorial Application Provision at issue here is not part of the model Uniform Consumer Credit Code. Thus, the Seventh Circuit's decision will not have broad ramifications beyond the confines of this case. Also, contrary to the arguments by Petitioner and his amici, this Court has already provided ample and clear guidance to lower courts and state legislatures concerning the permissible reach of state legislation under the Commerce Clause. Finally, the myriad arguments by Petitioner and his amici concerning "predatory" lending, Internet lending, and the "tension" between Commerce Clause and Due Process jurisprudence supposedly created by *dicta* in the decision below utterly fail to demonstrate that certiorari is warranted here.

STATEMENT

In 2007, Indiana amended its version of the Uniform Consumer Credit Code. It added a "Territorial Application Provision," which states as follows:

> (d) [A] sale, lease, or loan transaction occurs in Indiana if a consumer who is a resident of Indiana enters into a consumer sale, lease, or loan transaction with a creditor . . . in another state and the creditor . . . has advertised or solicited sales, leases, or loans in Indiana by any means, including by mail, brochure, telephone, print, radio, television, the Internet, or electronic means. . . .

Ind. Code § 24-4.5-1-201(1)(d). Thus, both on its face and as applied by the Indiana Department of Financial Institutions to Midwest Title, the Territorial Application Provision purports to regulate loans made in-person outside of Indiana's borders to Indiana residents so long as the lender has done any advertising or other solicitation in Indiana.

If the Territorial Application Provision is triggered, the lender becomes subject to the Indiana Uniform Consumer Credit Code. It then is required to obtain a license from the State to make consumer loans and is bound by a variety of restrictions that include a ceiling on the annual interest rate that a lender may charge. The ceiling is the lower of 21% of the entire unpaid balance, or 36% on the first $300 of unpaid principal, 21% on the next $700, and 15% on the remainder. Ind. Code § 24-4.5-3-508. A lender required to have a license who fails to obtain it or violates any of the statutory restrictions is exposed to a variety of administrative and civil remedies. Ind. Code §§ 24-4.5-6-108, 24-4.5-6-110, 24-4.5-6-113. The failure to obtain a license also voids the loan – the borrower doesn't have to repay even the principal. And a borrower who has paid finance charges in excess of those permitted by the Code is entitled to a refund. Ind. Code § 24-4.5-5-202. Pet. App. 2a-3a.

The relevant facts were stipulated by the parties in connection with their respective motions for summary judgment. Pet. App. 48a-56a. Midwest Title is an Illinois business corporation and licensed by the Illinois Department of Financial Institutions as a

consumer installment loan company. Pet. App. 48a. It is an auto title lender, making cash loans to very high risk borrowers which are secured by the borrower's automobile. Pet. App. 3a. The interest rate on these loans is allowed under Illinois law, but exceeds the 36% per annum rate limitation under the Indiana Uniform Consumer Credit Code. Pet. App. 49a. Midwest Title makes loans only from 23 stores located in Illinois. Pet. App. 48a. Most importantly, it only makes loans in-person to borrowers who travel to its Illinois stores. Pet. App. 49a.

Midwest Title maintains no stores, employees or agents in Indiana. Pet. App. 49a, 50a. Midwest Title does not own or lease property in Indiana, and does not hold a certificate of authority or license to do business in Indiana.[1] Pet. App. 53a. It does not have agents or employees who solicit business in-person in Indiana. Pet. App. 53a. Other than this lawsuit, it has not filed any suits in Indiana, and has not filed any suits against Indiana borrowers to collect deficiency judgments. Pet. App. 53a.

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[1] Because Midwest Title made its loans to Indiana residents only in-person at its Illinois stores, it was not required to have a certificate of authority to do business in Indiana. *See* Ind. Code § 23-1-49-1(b)(6) and (b)(11) (a company is *not* considered to be transacting business in Indiana if it is "[s]oliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside of Indiana before they become contracts" or if it is "[t]ransacting business in interstate commerce").

To obtain a loan from Midwest Title, an Indiana resident had to travel to Illinois with his or her motor vehicle and the title to the vehicle, and appear in-person at a Midwest Title store in Illinois. Pet. App. 50a-51a. Midwest Title did not make any loans to Indiana residents who were not physically present at an Illinois store. Pet. App. 51a. If approved, the loan applicant had to execute the necessary loan documents at the Illinois store and provide Midwest Title with a set of keys and the title to the automobile in order to secure repayment. Pet. App. 51a. The loan funds would then be disbursed at the Illinois store by check drawn on an Illinois bank which could be cashed without charge at the Illinois store (or could be cashed elsewhere). Pet. App. 51a. The Installment Loan and Security Agreement provided that the transaction would be governed by the law of the state in which the Agreement was executed, which was Illinois. Pet. App. 51a.

After making a loan to an Indiana resident, Midwest Title generally submitted to the Indiana Bureau of Motor Vehicles the documentation necessary for Midwest Title's lien to be noted on the borrower's motor vehicle title. Pet. App. 52a. Borrowers could make re-payments in person at Midwest Title's Illinois stores or pay by money order or certified check transmitted through the U.S. mail or other means, by credit card or through Western Union. Pet. App. 52a. No payments are accepted by Midwest Title in Indiana. Pet. App. 52a.

Midwest Title advertised on radio and television stations in Indianapolis and Terre Haute, Indiana. Pet. App. 51a. It also advertised on radio and television stations in Chicago which reached Indiana residents. Pet. App. 52a. Midwest Title made annual mailings to past customers, including Indiana residents, reminding them of the availability of loans from Midwest Title. Pet. App. 51a. Midwest Title was also listed in the Yellow Pages directory in some Indiana communities. Pet. App. 52a.

Midwest Title made in-person loans in Illinois to Indiana residents from 1999 until August 2007. Pet. App. 50a. In August 2007, Midwest Title received a warning letter from the Indiana Department of Financial Institutions apprising it of the recently-enacted Territorial Application Provision. Pet. App. 49a, 54a. The letter warned Midwest Title that the Territorial Application Provision "requires lenders who are soliciting by any means and then making consumer loans to Indiana residents to be licensed" under the Indiana Uniform Consumer Credit Code. Pet. App. 54a. It admonished that "[f]ailure to comply with Indiana law concerning loans made to Indiana residents could subject your company to regulatory enforcement by the office of the Indiana Attorney General and raise possible civil claims by customers." Pet. App. 54a.

Upon receipt of the warning letter, Midwest Title immediately suspended offering loans to Indiana residents. Pet. App. 54a. It also stopped charging and collecting interest on loans made to Indiana

borrowers between July 1, 2007 and receipt of the letter, and refunded all previous payments of interest on those loans. Pet. App. 55a.

1. The District Court Decision

Midwest Title filed suit under 42 U.S.C. § 1983 against the Indiana Department of Financial Institutions seeking to enjoin enforcement of the Territorial Application Provision. Pet. App. 22a. Based on the facts stipulated by the parties, the District Court issued a thoughtful, carefully reasoned ruling that the Territorial Application Provision was unconstitutional under the dormant Commerce Clause. Pet. App. 21a-43a. The District Court concluded that "no credit agreements were finalized within Indiana;" instead, "the loan transactions at issue in this case occurred wholly within the state of Illinois." Pet. App. 35a, 37a. The Court emphasized that "no loan agreement came into existence until an Indiana customer traveled to Illinois and obtained a loan at a Midwest Title store. That transaction at that point was completed and it clearly occurred within Illinois where loan documents were signed and Midwest Title had tendered a loan payment in exchange for a promise to repay." Pet. App. 36a-37a.

The Court concluded that "[t]he present case does not involve a statute which merely burdens interstate commerce or has extraterritorial *effects*. It concerns a statutory provision which, by design, directly regulates extraterritorial activity. Even according to

Defendant's primary authority . . . such a statute is *per se* invalid." Pet. App. 39a. (italics in original). The Court correctly recognized that extraterritorial regulation of interstate commerce is not allowed: "[j]ust as 'citizens do not carry their home state's laws with them wherever they go' . . . state laws surely should not be permitted to travel wherever someone would have them go." Pet. App. 41a. The Court stressed that it "is not unsympathetic to Indiana's policy interests against the predatory lending practices seemingly prevalent in the consumer loan industry . . . However, it is the domain of Illinois to regulate its own consumer lending industry, as Indiana has the power and responsibility to regulate its own consumer lending industry." Pet. App. 42a. Indeed, "[a] state may not directly regulate conduct or events beyond its own borders, no matter its motivation for doing so." Pet. App. 39a-40a.

2. The Seventh Circuit Decision

The Seventh Circuit unanimously affirmed the District Court's decision. Pet. App. 1a-20a. Writing for the Court, Judge Posner carefully addressed all of the myriad legal and public policy arguments offered by both the State and its amici in a carefully-crafted, scholarly opinion. The Court of Appeals correctly recognized that the Midwest Title loans were "made and executed in Illinois," as "[t]he loans were made only in person, at Midwest's offices in Illinois." Pet. App. 4a, 18a. Indeed, every single aspect of the loan transaction occurred in Illinois:

> Each title loan that Midwest made to a Hoosier was in the form of a check, drawn on an Illinois bank, that was handed to the borrower at Midwest's loan office and could be cashed there. Illinois was also where the conditional transfer of title to the collateral was made (the handing over of the keys – the 'pawn'), and where the payments required by the loan agreement were received by Midwest. Pet. App. 17a-18a.

Judge Posner's opinion properly held that under this Court's longstanding Commerce Clause jurisprudence, "where states actually attempt to regulate activities in other states," there is a *per se* violation of the Commerce Clause. Pet. App. 10a. Such extraterritorial regulation will be "invalidated without a balancing of local benefit against out-of-state burden." Pet. App. 10a. Significantly, the opinion did not reject or refuse to follow the holding of any other appellate court opinion. Quite to the contrary, the Seventh Circuit cited with approval a number of decisions by other Circuits that have similarly held that the dormant Commerce Clause renders invalid *per se* a state's extraterritorial enforcement of its laws.[2] Pet. App. 10a-11a.

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[2] The Court relied upon the following decisions from other circuits: *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 62-64 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009); *Carolina Trucks & Equip. v. Volvo Trucks, N. Amer.*, 492 F.3d 484, 488-90 (4th Cir. 2007); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 239-41 (4th Cir. 2004); *American Booksellers Foundation v. Dean*, 342 F.3d 96,

(Continued on following page)

Like the District Court, the Seventh Circuit specifically addressed the public policy arguments raised by the State and its amici concerning "predatory" lending in general, and auto title lending in particular. Pet. App. 5a-8a. The Court of Appeals properly held that "the projection of one state regulatory regime into the jurisdiction of another State" runs afoul of the Commerce Clause, "however well intentioned and genuinely beneficial to the state imposing it." Pet. App. 12a, 14a. In characteristic fashion, Judge Posner illustrated this principle with various hypothetical examples of possible state extraterritorial legislation that might be enacted for the salutary purpose of protecting a state's own citizens from harm in other states (*e.g.*, addictive gambling in out-of-state casinos; the purchase of dangerous firecrackers in adjacent states; or the consumption of trans fats in restaurants in other states) but would nonetheless violate the Commerce Clause "by restricting travel and a firm's ability to deal with residents of a different state." Pet. App. 12a, 18a-19a. Each of those examples demonstrates that "[c]ommerce would be impeded if states could regulate commercial activities in other states." Pet. App. 11a. In other words, "[t]o allow Indiana to apply its law against title loans when its residents transact in a different state that has a different law would be

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102-04 (2d Cir. 2003); *National Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 638-40 (9th Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994).

arbitrarily to exalt the public policy of one state over that of another." Pet. App. 15a.

The State did not seek rehearing of the panel's unanimous decision.

REASONS FOR DENYING THE PETITION

The assiduous efforts of Petitioner and his amici to create the appearance that the decision below has created a circuit conflict are unavailing. Neither the rather prolix Petition for Certiorari nor the two amici briefs identify *any* appellate decision which has allowed a state to regulate a loan or purchase that was entered into in-person wholly outside its own borders. The Seventh Circuit did not reject or criticize any applicable precedent from other appellate courts, but instead acted in accordance with decisions by this Court and courts of appeals from other circuits that have consistently and uniformly held that direct extraterritorial state regulation of interstate commerce is a *per se* violation of the Commerce Clause.

I. The Seventh Circuit Decision Comports Fully With This Court's Well-Settled Commerce Clause Jurisprudence

Contrary to the assertions by Petitioner and his amici, there is no conflict in the circuits or doctrinal confusion warranting a grant of certiorari in this case. Indeed, neither the Petition nor the amici briefs cite *any* appellate decision suggesting that there is

either a circuit split or uncertainty in the lower courts concerning the extent to which a state may engage in extraterritorial regulation of interstate commerce. The reason for the absence of a circuit split or confusion in the lower courts is that this Court has already provided clear guidance with respect to the limits imposed by the dormant Commerce Clause on state efforts to directly regulate interstate commerce that occurs wholly outside the state's borders.

This Court long has recognized that the affirmative grant of authority to Congress to regulate interstate commerce "also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Institute*, 491 U.S. 324, 326 n.1 (1991). *See also Dennis v. Higgins*, 498 U.S. 439, 447 (1991) ("[T]he Commerce Clause does more than confer power on the Federal Government; it is also a substantive 'restriction on permissible state regulation' of interstate commerce.").

One of the ways in which a state law will be held invalid *per se* under the Commerce Clause is if it directly regulates commerce occurring entirely outside of the state's borders. The extraterritoriality principle is well established in this Court's jurisprudence, dating back over a century to *Bonaparte v. Tax Court*, in which this Court held that "[n]o State can legislate except with reference to its own jurisdiction." 104 U.S. 592, 594 (1881). Thereafter, in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), this Court held that a state regulation purporting to

set prices for transactions occurring in another state was barred by the Commerce Clause. Justice Cardozo's opinion for the Court stated that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." *Id.* at 521.[3]

A half-century later, in *Healy v. The Beer Institute*, 491 U.S. 324 (1989), this Court held that a state may not enact laws that establish prices for transactions that occur in other states. The State of Connecticut prohibited in-state beer sales at prices exceeding the distributor's out-of-state prices. Although the trigger of the regulation was the sale of beer *within* the State, this Court held the regulation unconstitutional under the dormant Commerce Clause because the pricing mechanism also regulated prices in out-of-state transactions.

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[3] *See also New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority, and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question, and hence authorities directly dealing with it do not abound"); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extraterritorial effect only by the comity of other States").

The Court emphasized that its various decisions holding that extraterritorial state laws violate the dormant Commerce Clause "reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Id.* at 335-36.

The Court in *Healy* clearly delineated the following governing principles concerning state regulation of interstate commerce:

> First, the 'Commerce Clause . . . *precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State,' Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982) (plurality opinion); *see also Brown-Forman*, 476 U.S., at 581-583; and, specifically, a State may not adopt legislation that has the practical effect of establishing 'a scale of prices for use in other states,' *Seelig*, 294 U.S., at 528. Second, *a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid* regardless of whether the statute's extraterritorial reach was intended by the legislature. *The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Brown-Forman*, 476 U.S., at 579. . . . Generally speaking, the Commerce Clause protects against

> inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State. . . . And, specifically, the Commerce Clause dictates that *no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another. Brown-Forman*, 476 U.S., at 582.

Healy, 491 U.S. at 336-37 (emphasis added, footnote omitted). *Accord BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571, 573 (1996) (no state may "impose its own policy choice on neighboring States," and a state may not "impose sanctions . . . in order to deter conduct that is lawful in other jurisdictions").

Just as the "result [was] clear" in *Healy* when the foregoing guiding principles were applied to Connecticut's price-affirmation statute (491 U.S. at 337), the result is equally clear when those same principles are applied to Indiana's Territorial Application Provision. As evidenced by its very name, that Provision purports to directly regulate loan transactions that occur "wholly outside of the State's borders," and thus the Seventh Circuit correctly held that it constitutes a *per se* violation of the Commerce Clause. *See Brown-Forman Distillers v. N.Y. Liquor Auth.*, 476 U.S. 573, 579 (1986) ("When a state statute directly regulates or discriminates against interstate commerce . . . we have generally struck down the statute without further inquiry.").

Petitioner and amici Commonwealth of Virginia, et al. argue that the Seventh Circuit should have

applied the more lenient balancing test adopted by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Pet. at 24-26; Brief of Commonwealth of Virginia, et al. at 13-20. However, the *Pike* balancing test applies only where a statute "regulates even-handedly to effectuate a legitimate local public interest, *and its effects on interstate commerce are only incidental*." 397 U.S. at 142 (emphasis added). *Accord Healy*, 491 U.S. at 337 n.14 (*Pike* balancing test applies only when "a statute has only indirect effects on interstate commerce"), *quoting Brown-Forman*, 476 U.S. at 579.

The Seventh Circuit properly rejected Petitioner's effort to invoke the *Pike* balancing test. This case does not involve a statute which merely has "indirect" or "incidental" effects on interstate commerce. Instead, the Territorial Application Provision was enacted for the specific purpose of *directly* regulating wholly extraterritorial loan transactions. As noted by Judge Posner, "the effect of the territorial-application provision on an out-of-state business selling to customers in that state is more direct than in *Healy*; the provision forbids the making of title loans in Illinois to residents of Indiana on the terms agreed to by the parties." Pet. App. 11a-12a.

The argument by Petitioner and his amici that the *Pike* balancing test applies here simply because the Territorial Application Provision "vindicates compelling state consumer-protection interests" (Pet. at

24)[4] finds no support whatsoever in *Pike*, *Healy*, *Edgar* or any other decision by this Court. However well intentioned an extraterritorial law may be, it is *per se* unconstitutional under the Commerce Clause. *See Bigelow v. Virginia*, 421 U.S. at 824 ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.") The *per se* rule of invalidity applies to state laws that, like Indiana's law, directly regulate "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy*, 491 U.S. at 336.

Petitioner also proffers the argument that the Seventh Circuit erred by relying on *Healy* and *Brown-Forman* because those cases supposedly stand only for the "highly limited" proposition that state laws are invalid under the Commerce Clause "where they (1) regulate wholly extraterritorial commercial activity *and* (2) protect the state's consumers at the expense of consumers in other States." Pet. at 21 (emphasis added). *See also* Pet. at 23 (this Court's prohibition against regulating commerce wholly outside the State's borders "means only that a State may not regulate extraterritorially where to do so benefits its

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[4] *See also* Brief of Commonwealth of Virginia, et al. at 19 ("The Indiana act serves an important and traditional sovereign interest – protecting consumers from abusive practices").

own citizens only by burdening the citizens of other States.").

Petitioner does not (and, indeed, cannot) cite any language from *Healy* or *Brown-Forman* to support his novel and unduly restrictive interpretation of those decisions.[5] In fact, this Court has *not* held that extraterritorial state laws pass muster under the Commerce Clause so long as they don't "protect the state's consumers at the expense of consumers in other States." Pet. at 21. Instead, "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336. If so, the law runs afoul of the Commerce Clause, regardless of whether or not it favors the State's own citizens or imposes any burdens on citizens of other states. *See also Healy*, 491 U.S. at 337 n.14 (stating that *per se* rule of invalidity applies in *either* of two alternative scenarios: if "a state statute directly regulates or discriminates against interstate commerce, *or* when its effect is to favor in-state economic interests over out-of-state interests") (emphasis added).

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[5] Even the briefs filed by the amici curiae acknowledge that extraterritorial regulation of interstate commerce is invalid *per se*, regardless of whether it is based on economic protectionism or favoritism towards local consumers. Brief of Public Citizen, et al. at 6 ("Under the Commerce Clause, a state may not regulate commerce occurring wholly outside its borders"); Brief of Commonwealth of Virginia, et al. at 17 ("the dormant Commerce Clause imposes some limits on a State's ability to impose even facially neutral laws with an extraterritorial reach . . . ").

In sum, the Seventh Circuit's opinion was entirely faithful to this Court's controlling precedents concerning the limits placed by the dormant Commerce Clause on state efforts to engage in extraterritorial regulation. Contrary to the unfounded assertions by the amici curiae,[6] this Court's jurisprudence is clear and well-settled, and has not engendered conflicts, confusion, or uncertainty in the lower courts.

II. There Is No Circuit Split

The opinion by the Seventh Circuit did not criticize or refuse to follow any decision by another circuit court, and there is no circuit split warranting this Court's review. Neither Petitioner nor his amici has cited even a single appellate decision upholding against a Commerce Clause challenge a state law regulating loans or purchases entered into in-person wholly outside the regulating state's borders. Instead, the cases relied upon by Petitioner and his amici are all readily distinguishable. They involved multi-state transactions in which, quite unlike the present case, the consumers entered into the loans or purchases from within the confines of their home state either through the mail or over the Internet, rather than by travelling to the state of the lender or seller to enter into the transaction in-person.

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[6] *See* Brief of Commonwealth of Virginia, et al. at 7 (this Court's dormant Commerce Clause cases "provide little guidance"); *id.* at 9 ("*Edgar*, *Healy*, and *Brown-Forman* provide very limited guidance to state legislatures" and "leave wide gaps" in an important area of the law).

Petitioner first argues that the Seventh Circuit's decision conflicts with a trio of cases from the mid-1970's involving a mail order business called Aldens. Pet. at 9, citing *Aldens, Inc. v. Ryan*, 571 F.2d 1159, 1161 (10th Cir.), *cert. denied*, 439 U.S. 860 (1978); *Aldens, Inc. v. LaFollette*, 552 F.2d 745, 748 (7th Cir.),[7] *cert. denied*, 434 U.S. 880 (1977); *Aldens, Inc. v. Packel*, 524 F.2d 38, 41 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). In each of those decisions, Aldens was required to comply with the consumer credit laws of other states when its customers in those states ordered merchandise by mail through the Aldens catalogue. As emphasized by the District Court in this case, the *Aldens* cases plainly did not involve extraterritorial regulation of loan transactions, because "in each of these cases, the customer was located in his or her home state when he or she ordered merchandise and entered into the purchase contract." Pet. App. 37a at n.10.[8]

Indeed, in *Aldens v. LaFollette*, the Court had stressed that its decision on the Commerce Clause issue would have been very different if Wisconsin had sought to enforce its interest rate limitations on

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[7] It is curious indeed that Petitioner points to the Seventh Circuit decision in *Aldens* in support of his claim of a circuit split.

[8] *See also A.S. Goldmen & Co. v. New Jersey Bureau of Sec.*, 163 F.3d 780, 787 (3d Cir. 1999) ("when an offer is made in one state and accepted in another . . . elements of the transaction have occurred in each state and . . . both states have an interest in regulating the terms and performance of the contract.").

transactions entered into by Wisconsin residents outside of Wisconsin's borders:

> Suppose that many Wisconsin citizens have summer homes in Minnesota. *Wisconsin could not regulate Aldens' credit terms in mailings to Wisconsin citizens at their Minnesota summer addresses.*

552 F.2d at 751 n.10 (emphasis added).

Petitioner's reliance (Pet. at 13-14) on *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2062 (2009) is paradoxical, because the Tenth Circuit's decision actually underscores the correctness of the Seventh Circuit's decision in this case. The *Quik Payday* case involved efforts by Kansas to regulate "payday loans" made via the Internet to Kansas citizens by an out-of-state payday lender. At issue was a provision of the Kansas Uniform Consumer Credit Code which was very similar to the Territorial Application Provision adopted by Indiana, as it provided that a loan was deemed to be made in Kansas if the lender engaged in solicitation of the borrower in Kansas. Kan. Stat. Ann § 16a-1-201(1)(b).

Quik Payday argued that to the extent the Kansas statute purported to apply extraterritorially to Kansas residents who entered into Internet payday loans from their workplace computers in Missouri, it constituted a violation of the Commerce Clause. 549 F.3d at 1308. Significantly, the Kansas regulators recognized that such extraterritorial regulation would be unconstitutional. Therefore, to avoid an adverse

decision on the basis of extraterritoriality, *the Kansas regulators conceded that the statute would not apply where the loan was entered into by a Kansas resident from a computer located outside Kansas, even if there had been solicitation of the borrower in Kansas*:

> Defendants, however, have stipulated that such a transaction would not be governed by the Kansas statute. In district court they conceded that a website advertisement does not trigger application of Kan. Stat. Ann. § 16a-1-201(1)(b), even though the website is accessible in Kansas. See *Quik Payday*, 509 F.Supp.2d at 982 n. 7. Their brief in this court further clarified that the borrower's physical location at the time of the solicitation is controlling: it states that '[t]he [KUCCC] regulates the conduct of Internet payday lenders who choose to make payday loans with Kansas consumers *while they are in Kansas*.' Aplee. Br. at 24 (emphasis added). And referring to Quik Payday's hypothetical 'about a Kansas consumer leaving Kansas to acquire a payday loan,' *id.* at 25, it declared that 'The OSBC would not try to apply the [KUCCC] to loans that occur under th[ose] circumstances,' *id.* at 26.
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> It is unclear whether any of the 3,079 transactions between Quik Payday and Kansas residents involved solicitations of Kansas residents while they were in Missouri or elsewhere outside Kansas. Such a transaction would not have violated Kansas law.

549 F.3d at 1308-09 (emphasis in original).

Thus, *Quik Payday* did *not* uphold extraterritorial regulation of loans made outside of the state.[9] Instead, the Tenth Circuit's decision was fully consistent with the Seventh Circuit's holding here – a state cannot regulate a loan transaction entered into by its citizens entirely outside its borders. These decisions comport with this Court's decision in *Marquette Nat. Bank v. First of Omaha Corp.*, 439 U.S. 299 (1978). The issue in *Marquette* was whether the interest rate permitted by the lender's state or the borrower's state would apply to a national bank's loan under the National Bank Act, 12 U.S.C. § 85. The State of Minnesota, where borrowers of the bank were located, argued that its laws should apply "'[i]n the context of a national bank which systematically solicits Minnesota residents for credit cards to be used in transactions with Minnesota merchants. . . .'" 439 U.S. at 310 (citation omitted). This Court unanimously rejected this contention and held that the laws of Nebraska, where the bank was located, would apply. Although not citing to the Commerce Clause, the decision was premised in substantial part on this Court's understanding, consistent with its Commerce

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[9] The briefs filed by amici Public Citizen, et al. and the Commonwealth of Virginia, et al. each grossly mischaracterize the holding of the *Quik Payday* decision to the extent they suggest that it upheld the application of the Kansas Uniform Commercial Credit Code to loan transactions entered into by Kansas residents from computers located outside of Kansas. *See* Brief of Public Citizen, et al. at 13-14; Brief of Commonwealth of Virginia, et al. at 11-12.

Clause precedent, that one state could not regulate the interest rate charged on loans made in-person in another state. The Court pointed out that "*Minnesota residents were always free to visit Nebraska and receive loans in that State. It has not been suggested that Minnesota usury laws would apply to such transactions.*" *Id.* at 310-11 (emphasis added). Similarly, the Seventh Circuit correctly held that Illinois law, not Indiana law, applies to loans made to Indiana residents who "visit [Illinois] and receive loans in that State." *Id.*

In *Quik Payday*, the Kansas regulators acknowledged that notwithstanding the language of the Kansas statute, website advertising by the out-of-state payday lender did not suffice under the Commerce Clause to allow Kansas to regulate an ensuing loan transaction entered into wholly outside of Kansas. 549 F.3d at 1308. Similarly, in this case, the Seventh Circuit correctly ruled that Midwest's advertising in Indiana did not allow the State to regulate loans made in-person wholly outside the State's borders: "If Indiana cannot prevent Midwest from lending money to Hoosiers in Illinois, it cannot prevent Midwest from truthfully advising them of this opportunity." Pet. App. 18a.

Petitioner is also wide of the mark in relying upon the Third Circuit's decision in *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616 (3d Cir. 2009) in support of his claim of a circuit conflict. Pet. at 12. *Kaneff* is completely irrelevant here, as it merely involved a choice-of-law determination in connection

with a dispute over enforceability of an arbitration clause. It did not involve extraterritorial regulation of a loan transaction, and indeed did not even mention the Commerce Clause. Petitioner's suggestion that *Kaneff* upheld application of the borrower's state usury laws to the loan transaction at issue (Pet. at 20) is simply wrong – the Court did not decide the legality of the interest rate or which state's laws should apply to that determination.

In this case, the Seventh Circuit relied upon the Fourth Circuit's decision in *Carolina Trucks & Equip. v. Volvo Trucks, N. Amer.*, 492 F.3d 484 (4th Cir. 2007). South Carolina sought to regulate transactions in which residents of South Carolina traveled to a Georgia dealership to purchase trucks. That dealership was listed in the Yellow Pages in South Carolina, advertised in regional trade publications, and mailed brochures to South Carolina residents. *Id.* at 487. However, all sales transactions occurred on the dealership lot in Georgia. *Id.* The Fourth Circuit held that advertising in South Carolina was insufficient to subject the Georgia sales transactions to South Carolina law:

> [A] plaintiff cannot seek to apply one state's statute to transactions in another state through an expansive definition of the site of the regulated conduct. The plaintiff would hold that if a vehicle manufacturer advertised in *Car & Driver* or *Motor Trend*, or operated a direct mailing list open to all subscribers, all fifty states might properly

> assert that the manufacturer made 'sales' within their borders. Each state could thus seek to regulate the company's out-of-state conduct as connected to the sale without being held to regulate extraterritorially. This approach would take the commercial speech that is vital to interstate commerce and use it as a basis to allow the extraterritorial regulation that is destructive of such commerce. The Supreme Court, however, has indicated that the rule against extraterritorial application of state law is not a technicality to be so readily evaded. It has deemed extraterritorial statutes that seize upon a company's in-state commercial activities, such as the mailings and phone book advertising in this case, to regulate the companies' out-of-state conduct, here the Georgia truck sales.
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> Concluding that Arrow's Atlanta sales occurred within South Carolina on the basis of such advertising contacts would transform the rule against extraterritoriality from a protection of commerce into a formality easily evaded. Companies would be faced with a Hobson's choice between complying with extraterritorial regulations of their out-of-state activities, and foregoing their participation in interstate trade due to the silencing of their speech.

492 F.3d at 491-92.

Apparently realizing that the Seventh Circuit's decision here does not truly conflict with the *Aldens* mail order cases and the *Quik Payday* decision relied upon by Petitioner, amici curiae Public Citizen, et al. proffer an entirely "distinct" purported circuit conflict for this Court's consideration. Brief of Public Citizen, et al. at 6, 9-13. Relying on four cases[10] that were not even cited, much less relied upon, by Petitioner, these amici claim that "[t]he lower courts disagree on the test for determining whether a state law has an impermissible extraterritorial reach." *Id.* at 6. According to these amici, even though the loans at issue here were made in-person in Illinois, the Seventh Circuit's conclusion that the Territorial Application Provision constitutes impermissible extraterritorial regulation reflects a myopic and "fragmented" Commerce Clause analysis. *Id.* at 9, 12-13.

As a threshold matter, this Court should not consider the foregoing question, as it was not presented by Petitioner. *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 97 n.4 (1991); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981). In any event, the purported circuit conflict that the amici have attempted to conjure up is no

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[10] *Pharmaceutical Care Management Ass'n v. Rowe*, 429 F.3d 294 (1st Cir. 2005), *cert. denied*, 547 U.S. 1179 (2006); *Underhill Associates, Inc. v. Bradshaw*, 674 F.2d 293 (4th Cir. 1982); *Ferndale Laboratories, Inc. v. Cavendish*, 79 F.3d 488 (6th Cir. 1996); *Southern Union Co. v. Missouri Public Service Commission*, 289 F.3d 503 (8th Cir. 2002).

more genuine than the supposed conflict claimed by Petitioner. According to the amici, the Seventh Circuit "require[s] that a law be held *per se* invalid if any fragment of the transaction occurs out of state." Brief of Public Citizen, et al. at 9. This unfounded notion is amply refuted by the Seventh Circuit's decision in *Alliant Energy Corp. v. Bie*, 336 F.3d 545 (7th Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004). The Court utilized the *Pike* balancing test to dismiss a Commerce Clause challenge to certain statutory provisions, and expressly *rejected* the appellants' argument that a statute "should be declared invalid if it has *any* extraterritorial effects." *Id.* at 547 (italics in original).

The Seventh Circuit did *not* adopt or apply a "fragmented" approach to determine if the Indiana statute constituted extraterritorial regulation; it did not even address, much less criticize, any of the four cases cited by the amici; and none of those cases conflicts with the Seventh Circuit's approach in analyzing whether a state law has an impermissible extraterritorial state reach.[11]

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[11] Indeed, the meritless claim by the amici that the Seventh Circuit's decision conflicts with the Fourth Circuit's approach is contradicted by the fact that the Seventh Circuit heavily relied upon the Fourth Circuit's decision in *Carolina Trucks*, and the *Carolina Trucks* decision had expressly relied upon the Seventh Circuit's analytical approach in an earlier Commerce Clause decision involving extraterritorial legislation. Pet. App. 10a-11a, 17a, 18a; *Carolina Trucks*, 492 F.3d at 492 n. 2.

III. The Various Other Arguments By Petitioner And His Amici Fail to Demonstrate That Certiorari Should be Granted

None of the myriad other arguments for certiorari offered by Petitioner and his amici pass muster either.

Petitioner argues that review is warranted here because "many states regulate interstate loans." Pet. at 14. However, the briefs filed by Petitioner and his amici identify statutory provisions from only three jurisdictions besides Indiana which, like the Territorial Application Provision at issue here, deem a loan to have been made in the regulating state simply by virtue of in-state solicitations or advertising. D.C. Code § 28-3301(h); Kan. Stat. Ann. § 16a-1-201(1)(b); Me. Rev. Stat. Ann. tit. 9-A § 1-201. As noted above, when the Kansas statute was challenged on Commerce Clause grounds, the Kansas regulators readily conceded that it could not apply to Internet loan transactions entered into by Kansas residents from computers located outside the state's borders, notwithstanding the lender's advertising in Kansas. *Quik Payday*, 549 F.3d at 1308-9. There have not been any appellate decisions upholding the extraterritorial application of the District of Columbia or Maine provisions cited above, so there is no conflict warranting review by this Court.

Petitioner and his amici also argue at length that consumer protection interests are implicated here. They rely on hyperbole to suggest that great harm

will befall Indiana citizens if they are allowed to travel to Illinois to enter into desired loan transactions on terms they find acceptable to themselves. *See* Pet. at 17 ("If Indiana cannot protect its citizens from unfair and deceptive trade practices, who will?"); Brief of Public Citizen, et al. at 6 ("This case will determine whether or not states will be able to continue protecting their own residents from predatory lending.").

As discussed above, the lower courts correctly recognized that a state may not directly regulate interstate commerce occurring wholly outside its borders, even if it is motivated by a desire to protect the interests of its citizens. *Bigelow v. Virginia*, 421 U.S. at 824. As analogized by Judge Posner in one of his hypotheticals, Indiana could not require out-of-state casinos to obtain a license from Indiana in order to permit gambling by Indiana residents at such casinos, nor could Indiana limit the amount of money that Indiana residents could gamble at out-of-state casinos. Pet. App. 12a. Such extraterritorial regulation would be invalid *per se* under the Commerce Clause, even if Indiana "decided that gambling had become a serious problem for its residents -- many of them were becoming addicted and this was leading to bankruptcies that were playing havoc with family life and the Indiana economy." *Id.*

There is no suggestion in the record that Midwest Title's advertising or solicitation activities in Indiana were deceptive or fraudulent. But in any event, there is nothing in the Seventh Circuit's opinion that

would immunize Midwest Title or other out-of-state lenders from potential liability if they acted unlawfully in Indiana. Thus, the *in terrorem* claim that "[t]he Seventh Circuit's approach also weakens states' ability to regulate in-state conduct" is simply made up out of whole cloth. Brief of Public Citizen, et al. at 17. Also, it should be noted that the recently-enacted "Wall Street Reform and Consumer Protection Act" creates a new Consumer Financial Protection Bureau which will greatly strengthen the ability of the federal government and state attorneys general to regulate any "unfair, deceptive, or abusive act or practice" in connection with "any transaction with a consumer for a consumer financial product or service." Public Law No. 111-203 at §§ 1031, 1036 (2010).

Petitioner's final argument (Pet. at 26-35) attempts to make much of the *dicta* at the conclusion of the Seventh Circuit's opinion speculating as to how an Indiana court might resolve choice-of-law issues in a potential future suit between Midwest Title and a defaulting Indiana borrower. Pet. App. 15a-17a. However, Midwest Title has yet to file even a *single* lawsuit in Indiana against any of its borrowers. Pet. App. 53a. Therefore, the Court's pure conjecture as to how an Indiana court "might rule" (Pet. App. 15a) on a possible choice-of-law dispute in the highly unlikely event of a future lawsuit by Midwest Title against a borrower hardly creates "unnecessary tension between due process and Commerce Clause doctrine" warranting this Court's review. Pet. at 34. There simply is no Due Process issue in this case, and

indeed the Due Process Clause is not even mentioned in the "Question Presented" by Petitioner.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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